significant savings from joint finance, sales, legal, and other operations and staffing. They save further through joint acquisitions of certain products (e.g., cameras and sound equipment), services (e.g., consultants, ratings services), and programming.

In addition, each CBS owned station benefits from the experience and expertise acquired by CBS management and personnel over the years. This powerful benefit of group ownership, which should not be underestimated, permits skilled and successful television owners to bring their talents and resources to more markets, thus improving the capabilities and performance of additional stations. See id. at 45.

Jointly owned stations also can call on the combined economic resources of the group to support original programming production. In recent years, for example, various combinations of the CBS owned television stations have joined in presenting programming like STUDIO 22 and the children's programs CLUE YOU IN, KIDSIDE, and CHRISTMAS EVERY DAY, all of which have been produced by the stations individually or by the CBS Television Stations division.

Similarly, jointly owned stations can cooperate in news coverage and programming, greatly extending the reach and scope of their local news operations. The CBS owned television stations regularly share news footage with each other. For example, KCBS-TV, Los Angeles, shared with the other CBS owned stations its local coverage of the controversy regarding the use of allegedly excessive force by the Los Angeles County Police Department. In addition, the stations often share correspondents, crews, facilities and transponder space in pooled reports from major news events, such as political conventions, the fall of the Berlin Wall, the Gulf War, and the Middle East peace conference in Madrid. Group ownership thus allows each local station greater coverage of events and issues of local interest which unfold in remote locations.

In addition to the above, special benefits are available to television stations owned by the major networks. The CBS owned stations, for example, enjoy enhanced access -- beyond that provided to non-owned network affiliates -- to CBS News materials, personnel, and technical facilities. They also benefit from the expertise and counsel of experienced network management and employees. And they are aided in their abilities to attract talented management, news, and other employees by the opportunity for advancement to positions with the network.[20/]

At the same time, as the Commission has long recognized, ownership of stations in major markets is a vital component of a healthy and effective television network. Thus, in 1954, a time of far less diversity and competition in the television marketplace, the Commission observed that:

> "[t]he ownership of broadcast stations in major markets by the networks is an important element of network broadcasting. Our nation-wide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted."

Amendment of Section 3.636 of the Commission's Rules and Regulations, 43 F.C.C. 2797, 2801 (1954). Owned stations historically have served as the nucleus for network operations, providing general assurance that network programming will achieve at least minimal clearances and providing a base of personnel and economic resources from which networks can draw.

20/ Multiple Ownership, supra, at 53.

The emergence of the Fox network shows how ownership of bedrock stations, coupled with the resources and skills of a strong central management, still serves as the foundation for successful network operations, contributing popular and quality programming to audiences nationwide.

It is important, too, to remember that in this increasingly competitive environment, other major players on the programming side -- suppliers of basic, pay, and pay-per-view cable services -- do not operate under constraints on their vertical integration. Thus, many companies with substantial ownership interests in cable programming networks -- e.g., Time Warner, Viacom, TCI, Cablevision, Cox Cable, Newhouse, Comcast, Scripps-Howard -- also are among the nation's largest cable multiple system operators. Particularly in today's increasingly competitive marketplace, the television networks and other group owners should not be arbitrarily restrained from achieving the most efficient level of station ownership, while their increasingly vigorous competitors for programming and advertising are free from vertical restrictions. Id. at 53-54.

B. The Television Duopoly Rule Should Be Relaxed.

The so-called "duopoly" rules prohibit the common ownership of two or more broadcast stations in the same service (AM, FM, television) which serve "substantially the same area." Multiple Ownership Rules (Duopoly), 4 FCC Rcd 1723 (1989)("Duopoly"). The traditional purpose of the rules has been "to promote the dual goals of economic competition and diversity of program and service viewpoints." Id.

In 1989, the Commission modified the radio duopoly rules by reducing the signal contour areas within which joint ownership of stations is prohibited. Thus, the Commission narrowed the area of prohibited overlap from the 1 mV/m contour to the principal city contour (5 mV/m for AM stations and 3.16 mV/m for FM stations). The Commission concluded that this relaxation of the duopoly rules was warranted in light of (i) "the substantial growth in the number of media outlets in markets of all sizes since the rule was adopted [in 1964]," id., and (ii) the benefits of "enabl[ing] the public and broadcasters to take advantage of some of the efficiencies and cost savings attributable to common station ownership." Id. at 1729.

The same considerations favor a similar relaxation of the duopoly rules for television service, which currently preclude common ownership of stations with overlapping Grade B contours.

As the Commission observed in 1989, the rapid growth of broadcast and cable sources has meant a dramatic increase in the media alternatives available to residents of virtually every American community. Figures from 1987 cited by the Commission showed that the average market encompassed 10 over-the-air television signals, 20.4 commercial AM stations, 19.5 commercial FM stations, 36 cable channels with 48.8 percent cable penetration, 27.7 newspapers and significantly read magazines, and a VCR penetration rate of 48.7 percent. Id. at 1724.

For diversity purposes, as discussed above, we believe the Commission should consider this entire universe of media alternatives, which provide the public with an abundance of editorial and programming choices. However, even if one considers television alone, the number of outlets available to viewers is substantial and dramatically higher than that which existed at the time of the adoption of the duopoly rules.

In 1964, 61 percent of American television households received fewer than five channels of television programming, and only eight percent received nine or more channels.[21/] As of 1990, 92 percent of television households received seven or more broadcast signals, and the average number of television signals receivable per household was 11.7.[22/] In the country's ten most populous ADI's (i.e., geographic television markets), comprising nearly a third of all American households, the average number of local television stations was 18; the top 20 markets (about 45 percent of all households) averaged 15.8 local stations; and the top 30 markets (about 54 percent of all households) averaged 14 local stations.[23/] Fifty-two markets -- comprising more than 60 percent of all television households -- contained 10 or more local television stations.[24/]

Of course, when cable programming options are also taken into account, the number and growth of television options is even more impressive. Today, a full 63 percent of households can receive 20 channels or more of television

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21/ 1984 Nielsen Report on Television at 2.

22/ 1990 Nielsen Report on Television at 9.

23/ Based on listings in Broadcasting Yearbook 1991 at C-129 to -206.

24/ Id.

programming, and 56 percent can receive 30 or more channels.[25/] Indeed, the average number of channels receivable by the American household is 33.2.[26/]

This dramatic growth in video alternatives is due to several factors: the increase in the number of television stations, including low power facilities; the increased profitability of UHF stations; and the rapid rise of cable reach, subscription levels, channel capacity, and program sources.[27/] Moreover, not only are video alternatives rising in number, they are also becoming increasingly competitive. As the OPP Working Paper discusses in detail, the traditional dominance of network owned and affiliated stations has waned throughout the decade, with cable and independent stations (and stations affiliated with the new Fox network) gaining in audience and advertising shares.

The Commission also recognized in its radio duopoly proceeding the public benefits that could result from allowing common ownership of two or more same-service

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25/ 1990 Nielsen Television Report at 9.

26/ Id.

27/ Id. at 1726; see gen. OPP Working Paper, supra.

stations in the same area or in close proximity. The same considerations apply to ownership of television stations.

As the Commission observed with regard to radio, common ownership of nearby stations permits "significant efficiencies" in the form of consolidation of accounting, billing, payroll, sales and other administrative and general functions. Duopoly, 4 FCC Rcd at 1727. These cost savings and combination of station resources could well translate into increased financing of news, public affairs, and other programming that would benefit the public. Id. We note that the greater the area of overlap, the greater the incentive on the part of the common owner to differentiate the stations' programming and therefore maximize potential audience share.[28/]

Thus, for the same reasons as those which persuaded the Commission to modify the radio duopoly rules, we urge relaxation of the rule which limits television station ownership in a market. At the very least, the Commission should change the current prohibition to bar only overlap

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28/ See Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Quarterly J. Economics (1952).

between the Grade A, rather than Grade B, contours of jointly owned television stations. This modification of the rule was endorsed by the Commission staff in the OPP Working Paper.[29/] The Grade A contour has long served as the Commission's benchmark for its limitations on cross-ownership of television stations and non-television media (i.e., radio-television, cable-television, and newspaper-television cross-ownership).[30/] There is no reason why any more restrictive approach is necessary here.

In addition, the Commission should adopt a flexible waiver approach similar to that established in its recent relaxation of the "one-to-a-market" or "radio-television cross-ownership" rule, 47 C.F.R. Section 73.3555(b). Multiple Ownership Rules (One-to-a-Market), 4 FCC Rcd 1741 (1989). The Commission there abandoned its strict prohibition on the joint ownership of a commercial radio and television station in the same market, in recognition of the vastly increased diversity and competitiveness of local media markets. In its place, the Commission adopted

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29/ OPP Working Paper at 170.

30/ See, e.g., 47 C.F.R. Section 73.3555(c)(prohibiting common ownership of daily newspaper and television station if station's Grade A contour encompasses newspaper's community of publication).

a waiver procedure under which requests for waiver of the radio-television cross-ownership rule are viewed favorably if they involve (i) the top 25 television markets (with at least 30 separately owned broadcast stations) or (ii) a "failed" station that has been inoperative or is in bankruptcy proceedings. Id. Even if neither of these circumstances is present, waiver requests may still be made and will be evaluated case-by-case based on "the potential benefits of the combination, the types of facilities involved, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of [the Commission's] diversity and competition concerns." Id.

This same multi-pronged approach -- or some modified version of it -- should be applied to proposed television station combinations in the same or overlapping markets. For example, the Commission could establish a presumption of favorable review of co-ownership of two television stations when one is a "failed" station or, in the case of two UHF stations or a VHF-UHF combination, when the market contains 10 or more independently owned television stations (as is the case, as noted above, in 52 markets). Other proposed television co-ownership should be reviewed case-by-case according to the same criteria employed in assessing radio-television cross-ownership.

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In sum, the dramatic increase in television alternatives available to nearly every American household -- a fourth network, more independent stations, and a vast world of cable and VCR options -- has produced a diversity of programming and a level of competition scarcely imagined even a decade ago. There is no longer any justification for rules which unnecessarily encumber the ability of television station owners to expand through responsible and natural station acquisitions -- acquisitions which enable them to realize cost savings and other efficiences, to bring successful management skills and expertise to additional markets, and, in general, to extend and promote their service to the public. Particularly in light of the unrestricted vertical and horizontal expansion of cable owners and programmers, we urge the Commission to remove this artificial and needless restraint on broadcaster competitiveness.

II. NETWORKS SHOULD BE PERMITTED TO NEGOTIATE REASONABLE FINANCIAL INCENTIVES FOR THE CLEARANCE OF NETWORK PROGRAMS

The capacity for advertising revenue alone to support expensive first-run television programming is largely a function of the size of the audience to which that programming is exposed. It is for that reason that the national broadcast television networks are so important to the maintenance of universal free access to first-quality television programming. It is these networks that offer by far the most efficient method of exposing programs to the widest possible audiences, thus maximizing advertising support for the programs. As the Network Inquiry special staff observed a decade ago:

> "More resources can be expended on program production if those costs are spread over a large number of outlets and viewers. More funding for a national distribution system can be achieved if a national market in the sale of commercial time is established. Television networks are not profit-siphoning intruders into a system of local broadcast stations; they are indispensable organizers of the nation-wide system of television broadcasting."[31/]

With the diffusion of audience brought on by the proliferation of alternative television services, the

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31/ Network Inquiry Special Staff, Final Report, Vol I, 1980, p. 520.

ability of the national broadcast networks to attract the level of audience sufficient to support first-quality programming has become critical. If broadcast networks are to remain viable as distributors of expensive high-quality programming, they must be permitted to maximize the efficiency of their distribution. Regulations that artificially reduce clearances for network programming undermine the viability of networks and therefore promote the shift of first-quality programming from free television to pay television.

CBS recognizes that the right of affiliates to clear or reject network programs as they see fit is an important element of each individual licensee's responsibility. The Commission, however, can help significantly to preserve the universal access to quality programming that the broadcast networks provide by permitting the networks to negotiate freely with their affiliates for reasonable financial incentives for the clearance of network programming.

A. Intervention By The Commission That Artificially Reduces Affiliate Clearances of Network Programming Is Counter To The Public Interest.

The Commission's regulation of the terms of network affiliation agreements bearing on clearances began in 1941 with the adoption of the chain broadcasting rules for standard (AM) radio. At that time, the rules were seen as a necessary intervention to prevent established networks from foreclosing the entry of new networks -- this in light of the limited number of suitable outlets for prime time programming in most of the country's geographic markets. By limiting the ability of established networks to impose clearances on their affiliates, it was believed that competing networks might more readily obtain clearances on these same few full-time stations. Shortly after their enactment, the chain broadcasting rules were made applicable, in identical form, to the emerging technologies of FM radio and television.

In 1977 the Commission repealed all but one of the Chain Broadcasting Rules for radio networks and their affiliates.[32/] The rules that governed program clearances -- i.e., the right to reject rule and the rules against option time and exclusive affiliations -- were all eliminated.[33/] In its decision, the Commission cited

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32/ The rule against granting an affiliate territorial exclusivity was retained.

33/ Network Broadcasting by Standard (AM) and FM Broadcast Stations, 63 F.C.C.2d 674 (1977) ("Radio Deregulation").

examples of ways in which contractual provisions that secure affiliate clearances may be necessary to the effective functioning of a radio network.[34/]

The Commission based its repeal of the rules on "changed circumstances of network radio since 1941."[35/] First, there had been a sharp increase in the number of available outlets in most markets since the rules were enacted. And with this increase in the number of stations had come a corresponding increase in the number of "conventional" radio networks. Second, the role of radio networks had changed substantially from the days when they provided a major portion of the program service offered by their affiliates. And third, the Commission took note of "the lack of profitability of present-day radio networking overall."[36/]

Television, too, has changed dramatically since the 1960's, when the Commission last visited the rules governing affiliate clearances of television network

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34/ Id. at 679-80.

35/ Id. at 677.

36/ Id. at 677-78.

programs.[37/] And while there are qualitative differences in the nature of the changes that came to radio and to television, there are strong similarities as well.

As in radio, the number of television outlets has skyrocketed. The growth is in both broadcast stations and non-broadcast alternatives such as cable. As a consequence of this growth, one new television network and a multitude of cable networks[38/] have joined the three traditional broadcast networks in competing for programming, viewers and advertiser support. The competitive impact of this expansion has been as dramatic as any ever experienced by radio. Although television networks retain an important role as major purveyors of news, sports and entertainment programming, they are severely challenged in that role. As was the case for radio networks, broadcast television networks now suffer from a "lack of profitability...

37/ Amendment of Section 3.658(d) and (e) of the Commission's Rules and Regulations to Modify Option Time and the Station's Right to Reject Network Programs, 34 F.C.C. 1103 (1963).

38/ In 1990, program services available to cable systems included 73 nationwide basic networks, 14 regional networks, 24 regional sports networks, nine pay channels, eight home shopping channels, and eight pay-per-view channels. OPP Working Paper at 76-77.

overall."[39] Their "dominance," by any reasonable definition of that term, is a thing of the past.

In 1980, even before the competitive impact of cable on the television industry had been fully realized, the Commission's Network Inquiry Staff concluded that the Chain Broadcasting Rules were as ill-suited to the current state of television as the Commission had found them to be for radio. The staff recommended the abolition of, among others, all rules restricting network-affiliate agreements respecting clearances. The staff specifically opposed the restrictions on graduated compensation imposed in the Commission's 1963 decisions striking down CBS's "incentive compensation plan" (discussed infra).

The staff based its recommendation on its conclusion that the prohibited contractual terms would be imposed by networks, if at all, not to foreclose the entry of new networks but to "insure that the network is able to acquire the number of network program clearances from its

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39/ "Executives of NBC, CBS and ABC concede...that 1991 will be the first year in their history that the three major broadcast networks collectively post a loss." "NBC, ABC Face Major Staff Cuts," Electronic Media, July 22, 1991, p. 1. See also "Networks Gird For '92 Budget Cuts," Electronic Media, September 30, 1991, p. 1.

affiliates that maximizes the joint profits of the network and its affiliates."40/

CBS does not here challenge any of the Commission's rules governing clearances. We do not wish to option time on our affiliated stations, or to narrow our affiliates' right to reject network programming, or to prevent our affiliates from taking the programs of other networks.

We do believe, however, that we should have the right to bargain freely with our affiliates for network compensation arrangements that are structured on an economically rational basis -- arrangements that do not artificially bias clearance decisions against us.

In repealing the Chain Broadcasting Rules for radio, the Commission assumed the policies underlying these rules to be valid, but concluded that there was no need for the rules

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40/ Network Inquiry Special Staff, Final Report, Vol I, 1980, p. 475.

> "simply because (under these vastly different circumstances and with sharply reduced 'network dominance') the abuses and practices dealt with are unlikely to develop to any substantial extent."41/

It is our argument that current restrictions on the ability of television networks to offer meaningful financial incentives to obtain clearances rest on policies that are not valid -- that such incentives are not abuses to be prevented, but rather are essential to the viability of networks as distributors of first-quality programming. We ask the Commission to revisit its policies in this area, not because television networks have already ceased to perform the function they did thirty years ago (as was the case with radio networks), but because their ability to continue in that function is threatened by outdated regulation.

B. The Preemption Of Network Programs By Affiliates Is An Important Obstacle That A Television Network Faces In Seeking To Maximize The Exposure Of Its Programs.

In an auction market increasingly fueled by subscriber-generated revenue, the capacity of broadcast networks to bid successfully for first-quality programming

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41/ Radio Deregulation, 63 F.C.C.2d at 679.

depends on their ability to deliver that programming into as many homes as possible. As never before, every home counts. For while it is true that every television service, free and pay, rises or falls with the number of viewers it attracts, cable networks can earn far greater revenues than broadcasters from audiences of equal size.42/

42/ OPP Working Paper at 79. The capacity of cable to generate revenue on a per viewer-hour basis has already substantially outstripped that of broadcasting. Thus the staff observed in the OPP Working Paper that:

> "[i]ncluding cable network and local operating advertising, cable industry revenues were 71.8 percent as great as those of the broadcast industry, or 41.8 percent of the broadcast-cable total. Yet cable, including distant signals and superstations, accounted for only 32 percent of viewing in 1989/90 and cable advertising remains far below its potential level. Clearly cable has succeeded in earning much more revenue per viewer-hour than broadcasting." Id. at 74, citing Cabletelevision Advertising Bureau, Cable TV Facts, 1990 ed., at 12-13.

Of the 91.2 percent of television homes now passed by cable, only 59.6 percent actually subscribe to cable. However, because of a trend toward greater cable penetration the longer a cable system has operated, Paul Kagan Associates has projected cable penetration of 70.5 percent by 1999. Kagan Cable TV Financial Databook (June 1990). The outlook is thus for a sharp increase over the next decade in the revenues available to cable to bid for programming.

Ten years ago, when the three-network share of television households was far greater than it is today,[43/] preemptions of network programming were not a critical factor in the ability of the networks to amass an audience sufficient to support first-quality programming. Today, in a competitive environment in which networks must struggle for every tenth of a ratings point, preemptions are a very critical factor.

Preemptions significantly impair the value of network programs to advertisers. Since advertising campaigns are often linked to particular events and promotions, advertisers value the fact that network programs, and the commercial messages they carry, are transmitted simultaneously to audiences within virtually every geographic market within the United States. Thus, preemptions not only reduce the size of the audience exposure being purchased by the advertiser, but reduce the extra value of full simultaneous network exposure as distinct from piecemeal, non-simultaneous exposures.

Moreover, there is almost no way that a network can capture the value of its program in the geographic market

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43/ OPP Working Paper at 25.

in which it has been preempted. It is extremely difficult to place a single series, much less a single program, on an alternate station when the affiliate has rejected that program. Even if such alternative placement is possible, the program will be deprived of essential promotional support generally provided in other parts of the network schedule.

Many preemptions occur solely because of a marketplace distortion deriving from the Commission's past interpretations of the right-to-reject rule and related rules.[44/] The decision to preempt network programming is more often than not an economic decision on the part of the affiliate. And many of these decisions are economically rational only because the network has been precluded from offering an economic incentive for clearance sufficient to countervail a syndicator's competing offer for the same time period.

That is not to say that all preemptions are undesirable even from the network's point of view. The network/affiliate relationship is very much a partnership. It is in the

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44/ See 47 C.F.R. §§ 73.658(a) (exclusive affiliation); 73.658(d) (option time); and 73.658(e) (right to reject).

interest of both partners that an affiliated station be an inextricable part of the community it serves. There are preemptions which serve that end.

For example, many preemptions of network programming occur to enable the affiliate to cover important local news events. During the last season, 419 station-hours (i.e., 7.9 percent) of network prime time preemptions by CBS affiliates were attributable to local news coverage.[45/] Preemptions also occur for other events of great community interest. Indeed, as noted above, the CBS owned stations themselves sometimes preempt network programming for their own news specials and other public affairs features. Preemptions of this kind may well serve to increase the value of an affiliated station to its network by heightening the value of that station to its community.

In a free market, fewer preemptions would occur. But it would not be in the interest of any network to offer financial incentives that discourage an affiliate from maintaining a strong connection to the community it serves.

45/ During the 1990-91 television season, a total of 5,299 station-hours of network programming were preempted by CBS affiliates in prime time alone, with even more extensive preemptions in other dayparts.

Even in a free market, preemptions for news and community events would likely continue at the current rate.46/

The preemptions that would also continue unabated in a free market are those that would continue to make economic sense -- those that make way for programming of sufficient audience appeal to make them an attractive alternative to network programming even in the face of meaningful clearance incentives from the network.

The preemptions that would occur less frequently in a free market are those preemptions that make way for programming of relatively little audience appeal or community significance -- preemptions that occur today only because the Commission's marketplace intervention artificially inflates the profitability to the affiliate of these preemptions. A substantial portion of all preemptions fall into this category, consisting often of previously broadcast movies and other conventional entertainment programming.

46/ Indeed, it is probably the case that such preemptions are already, overall, less profitable to affiliates than would be the clearance of network programming scheduled for the time period in question.